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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: WAC 02 220 54471 Office: CALIFORNIA SERVICE CENTER Date: FEB 14 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner develops and manufactures food additives. It seeks to employ the beneficiary permanently in the United States as a microbiologist at an annual salary of $67,122. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition. On appeal, counsel asserted that the petitioner is a viable company that has secured considerable venture capital. The AAO concluded that the venture capital was insufficient to establish the petitioner's ability to pay the beneficiary the full proffered wage. The AAO also raised a new issue,[1] concluding that the beneficiary did not meet the requirements for the job set forth on the labor certification.

On motion, counsel asserts that the AAO miscalculated the petitioner's net current assets and used circular logic in rejecting its venture capital. In addition, counsel asserts that the petitioner's job recruitments were broader than the labor certification and requests that Citizenship and Immigration Services (CIS) amend the labor certification.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding an advanced degree or aliens of exceptional ability.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's filing date is April 20, 2001. The beneficiary's salary as stated on the labor certification is $67,122 annually.

The petitioner previously submitted Forms 1120 U.S. Corporation Income Tax Return for the tax years ending 2000 and 2001. On appeal, the petitioner submitted its 2002 return. As provided in our previous decision, these documents contain the following information:

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[1] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *Spencer Enterprises, Inc. v. United States,* 229 F. Supp. 2d 1025, 1043, (E.D. Calif. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003).

	2000	2001	2002
Net income (loss)	($1,924,459)	($2,187,832)	($1,924,459)
Current assets	$867,399	$652,957[2]	$294,502
Current liabilities	$539,751	$597,079	$493,027
Net current assets	$327,648	$55,878[3]	($198,525)
Stock and additional capital	$11,796,983	$12,571,232	$15,703,402
Retained earnings	($5,508,951)	($7,702,843)	($9,803,207)
Adjustments to shareholders' equity	($4,634,044)	($4,617,653)	($4,902,113)

As noted by counsel on motion and acknowledged in footnotes 2 and 3 of this decision, in our initial decision we listed the current assets and net current assets in 2001 as $676 less than the correct number.

On appeal, the petitioner, through counsel, submitted bank letters attesting to the petitioner's payment of its employees and that it maintained a balance of $438,491 on April 24, 2003. The petitioner also submitted its stock ledger; bank statements; 2003 investment agreement letters; a blank stock purchase agreement; its articles of incorporation; and materials regarding the petitioner's products. As stated above, the petitioner also submitted its 2002 tax return.

The AAO stated that it will consider venture capital and cash on hand on a case-by-case basis but concluded that the record was not persuasive that the petitioner had the ability to pay the proffered wage as of the filing date and continuing through 2002. The AAO acknowledged large increases in capital, but concluded that these increases covered large prior losses carried over from previous years, represented as negative retained earnings on the tax returns. The AAO also questioned the significance of the "adjustments to shareholders' equity" represented on schedule L, line 26. The AAO noted that line 26 requires an attached schedule for adjustments to shareholders' equity but that the record did not contain those schedules. Finally, the AAO noted that any increased cash from venture capital should be represented on Schedule L as a current asset and noted that the petitioner's net current assets did not demonstrate an ability to pay the proffered wage on the date of filing and continuing. While counsel implies on motion that the AAO stated that the petitioner's net current asserts were negative in 2001, the AAO actually stated:

> According to the numbers stated above, the petitioner's net current assets in 2001 *were less than the proffered wage* and it reported negative net current assets in 2002. Thus, we cannot conclude that the petitioner's venture capital establishes its ability to pay the proffered wage in 2001 or 2002.

(Emphasis added.) On motion, counsel notes that the AAO miscalculated the petitioner's net current assets in 2001. The AAO has acknowledged this error above and will consider the correct numbers in this decision. Counsel further asserts that the petitioner's net current assets for 2001 are sufficient to cover the prorated proffered wage covering the period in 2001 after the April 20, 2001 priority date.

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[2] In our initial decision, current liabilities were incorrectly listed as $652,281.
[3] In our initial decision, the net current assets were incorrectly listed as $55,202.

While CIS may prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence. CIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. We acknowledge that the petitioner is not relying on net income over a period of time but, rather, net current assets as of a certain date. Counsel, however, provides no legal authority establishing prorating as an appropriate means of evaluating a petitioner's claimed ability to pay the proffered wage. Even if we were to prorate the proffered wage for 2001, however, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate a continuing ability to pay the proffered wage. Thus, the petitioner must also demonstrate an ability to pay the proffered wage in 2002.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

On motion, counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, 449 (D.D.C. 1988) for the proposition that church pledges should be considered in an ability to pay analysis. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the proffered wage. Here, the petitioner is requesting that CIS consider venture capital as evidence of its ability to pay, even though venture capital creates an equity interest, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding equity interest, as does the venture capital. Regardless, the AAO considered the venture capital in its initial decision and will do so again below.

Counsel also cites *Masonry Masters v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989); for the proposition that CIS should consider the potential contributions of the beneficiary. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Our initial decision considered all of the evidence in detail, but concluded that the evidence was insufficient. We will elaborate on those conclusions below. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a microbiologist will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Finally, counsel cites *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054, for the proposition that "cash flow data" can be considered to show an employer's ability to pay the proffered wage. The petitioner in this case is not relying on cash flow data.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

In 2001, the petitioner suffered a large net loss and its net current asserts were less than the full proffered wage, although greater than the prorated proffered wage.[5] In 2002, the petitioner also suffered a large net loss and its net current assets were negative. While the petitioner's 2000 tax returns covers a period prior to the date of filing, the petitioner also suffered a large loss in 2000. The record contains no evidence of a profitable year for

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[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[5] The financial statements submitted on motion actually reflect net current assets of only $292 as of December 31, 2000, less than even the prorated proffered wage. The petitioner has not provided competent objective evidence resolving the inconsistency between the net current assets on the financial statements and the tax returns. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

the petitioner prior to the date of filing; thus, the record contains no evidence that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner at that time. In fact, in a letter from the petitioner's president submitted on motion, the petitioner does not expect to be profitable until the middle of 2005. Thus, contrary to counsel's assertions on motion, the petitioner has not presented the type of evidence considered sufficient in *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967).[6]

On motion, counsel asserts that the petitioner has always had sufficient cash on hand to pay the proffered wage. Counsel asserts that current assets are listed in order of liquidity on Schedule L and that the top figure is cash. Counsel continues:

> The AAO opinion states that because net current assets are not positive, the infusion of additional capital will not be considered to cover the bills[. This opinion] beguiles business reality. This is circular reasoning. Companies take in venture capital because the cash is needed to cover the costs of operation until sales cover all the expenses. If venture capital can be accepted it should be accepted for the common business purpose for which venture capital is needed and used by businesses.

Counsel further argues that the petitioner's investors are sophisticated investors who looked at factors not present on the petitioner's tax returns prior to investing. The petitioner provides a letter from a certified public accountant, [redacted] asserting that the adjustments to stockholders equity represent unexercised stock options awarded to employees. [redacted] asserts that such options are not a liability, but will generate income in the future. Nevertheless, this explanation suggests that the money was not yet available to pay the proffered wage in 2001 or 2002. The petitioner also submits materials regarding its products and their future marketability. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Considering the petitioner's available cash without considering its other liabilities and operating expenses would be ignoring a relevant part of the petitioner's complete financial picture. While the petitioner increased its capital from $11,796,983 at the end of 2000 to $15,703,402 at the end of 2002, it still ended the year with net liabilities of $198,525. Thus, the excess capital was insufficient to cover the petitioner's expenses and liabilities in addition to paying the proffered wage. Obviously, if CIS agrees to consider venture capital in addition to the typical net income and net current assets evaluation typically used, it cannot simply dismiss the venture capital because the net current assets cannot cover the proffered wage. Such a conclusion does not analyze the venture capital as a separate consideration. The fact that the infusion of venture capital, however, did not even lead to an increase in net current assets, which decreased to negative numbers, reduces the evidentiary value of that venture capital as a source of the petitioner's ability to pay the proffered wage.

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[6] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2001. In both years, the petitioner shows large net losses. In 2001, the petitioner showed net current assets less than the full proffered wage and in 2002 the petitioner showed negative net current assets. For the reasons discussed above, the record does not establish that the extra capital infused into the petitioner in 2001 and 2002 was sufficiently available to pay the proffered wage. Moreover, some that capital constituted unexercised stock options. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001 and continuing in 2002.

The second issue in this proceeding is whether the petitioner has demonstrated that the beneficiary meets the requirements of the job as set forth on the labor certification. The regulation at 8 C.F.R. § 204.5(k)(2) permits the following substitution for an advanced degree:

> A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The petitioner claims that the beneficiary has the equivalent of a baccalaureate degree plus at least five years of progressive experience. The record contains the beneficiary's 1982 baccalaureate degree issued by Shenyang Pharmaceutical University and an evaluation of this degree by Globe Language Services. The evaluation concludes that the beneficiary's degree is the equivalent of a U.S. baccalaureate degree from an accredited institution. The petitioner also submitted a letter verifying the beneficiary's progressive employment for the Sichuan Industrial Institute of Antibiotics from 1982 to 1999. Thus, the AAO concluded that the petitioner had the equivalent of an advanced degree.

As noted in our previous decision, however, the issue being raised is not whether, under the regulations, the beneficiary *could* be classified as an advanced degree professional. Although he does not actually possess an advanced degree, he has had at least five years progressive experience since he received his baccalaureate. Thus, he would be deemed to have the equivalent of an advanced degree. The issue in this case, however, is whether the beneficiary meets the job requirements of the proffered job as actually set forth on the labor certification. The key to this determination is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered.

As stated in our previous decision, it is important that the ETA-750 be read as a whole. Block 14 on the ETA-750 Part A contained in the record contains the following information:

Block 14 on the ETA-750 Part A contained in the record contains the following information:

> Education – "6"
> College Degree Required – "Master of Science"
> Major Field of Study – "Biology or Pharmaceutical Science"
>
> Experience – Blank

Block 14 of the Form ETA 750 includes no asterisks. Block 15 includes the following other special requirements:

> 3 years experience with handling pathogens and antimicrobial compounds in operational food and medical environment. Knowledge of ICP, HPLC, and PCR.

The labor certification's description of the job qualifications does not call for a Master's degree "or the equivalent," but for a Master's degree. The AAO concluded that nothing on the labor certification indicates that the petitioner would accept a baccalaureate degree plus five years of progressive experience in lieu of a Master's degree. Thus, the AAO concluded that the beneficiary[7] did not meet the requirements of the labor certification. The AAO cited *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (1977).

Subsequent to filing the initial motion, on August 12, 2004, counsel submits evidence that the Department of Labor (DOL) refused counsel's request to amend the degree requirements on the labor certification. Specifically, [redacted] Certifying Officer for Region 6 of the Employment and Training Administration of DOL, concluded that the initial labor certification application was "reviewed appropriately." [redacted] continues that "the determination is eventually made on what is stated in the ETA 750A Form which drives the process and the advertisement should conform to the form, not the other way around." [redacted] concludes:

> In addition, our procedures provides [sic] for "amendments" to the application up until it is certified. Once, the application is certified, any requests for amendments/changes to the application must be made to approved [sic] by the USCIS. Based on the above, the request to amend the certified application is denied.

Counsel asserts that the recruitment for the position provided that a bachelor's degree plus five years was sufficient and that DOL decisions issued by the Board of Alien Labor Certification Appeals (BALCA) allow for amendments in such cases. Counsel also requests that CIS amend the labor certification or request that DOL amend it. Subsequently, on August 2, 2004, counsel requests that the AAO hold the motion in abeyance until DOL amends the labor certification.

To determine whether a beneficiary is eligible for a third preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The letter from [redacted] does not overcome the legacy Immigration and Naturalization Service (INS), now CIS, policies upheld in these decisions. BALCA decisions relating to DOL authority are not legal authority supporting the assertion that CIS can amend the job requirements on a labor certification issued by DOL.

In a November 19, 2004 letter, counsel advises us that he has again requested DOL to amend the labor certification and asserts that he "will send [us] a copy of the DOL's reply." In the new letter to DOL, enclosed with counsel's November 19, 2004 letter to the AAO, counsel asserts that a 1992 memorandum from DOL

[7] The AAO mistakenly used the term "petitioner," but clearly meant that the beneficiary did not meet these requirements.

documents an agreement between DOL and legacy INS whereby DOL will amend a labor certification without a request from CIS. The record contains no DOL response to this letter.

The regulation at 8 C.F.R. § 103.3(a)(2)(vii) allows for limited circumstances in which a petitioner can supplement an already submitted appeal. This regulation, however, applies only to appeals, and not to motions to reopen or reconsider. There is no analogous regulation that allows a petitioner to submit new evidence in furtherance of a previously filed motion. By filing a motion, the petitioner does not guarantee himself an open-ended period in which to repeatedly supplement the record with evidence that plainly did not exist at the time the motion (let alone the underlying petition) was filed. Otherwise, a petitioner could indefinitely delay the adjudication of the motion, simply by repeatedly submitting new documents and requesting still more time to prepare still more submissions. Thus, we need not await another letter from DOL.

Moreover, the 1992 memorandum cited by counsel is not persuasive that DOL has the authority to grant counsel's most recent request. The memorandum, from [redacted] provides that legacy INS and DOL entered into an agreement that legacy INS would make determinations regarding changes in the employer's name and address. The petitioner in this case has not changed its name or address. Rather, the amendment sought relates to the job requirements. The memorandum continues, in pertinent part:

> It is inappropriate for Certifying Officers to make amendments to any items on the certified ETA 750 that relate to the test of the labor market for U.S. workers. Such items, for example, include: rate of pay (item 12), job description (item 13), and *job requirements (items 14 and 15)*. . . . After a certification has been issued, exceptions should only be made in cases where the Certifying Officer made an error, as explained below, in processing the application.

(Emphasis added.) The memorandum continues that errors include situations where "a proper amendment was requested and not made before the certification was issued." According to the letter from [redacted] the initial labor certification application was "reviewed appropriately." Finally, the BALCA decision submitted on August 12, 2004, *California Redwood Signs*, 1990 INA 348 (BALCA June 20, 1991), involves the denial of a labor certification after a request to amend a pending application, not a request to amend an approved labor certification.

For the reasons set forth above, we affirm our determination that the beneficiary does not meet the job requirements set forth on the labor certification. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of June 1, 2004 is affirmed. The petition is denied.